In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 17–23, reported at 292 F. Supp. 842) dismissing an action brought to set aside certain orders of the Interstate Commerce Commission (J.S. 24–27; 41). Those orders granted temporary authority to Railway Express Agency, Inc. (REA), pursuant to Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), to operate as a

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motor common carrier transporting general commodities in express service over regular routes between Washington, D.C., and Richmond, Virginia.[1] This temporary motor authority is limited to operations auxiliary to or supplemental of REA's express service (J.S. 26).

The facts in this case are undisputed. For years, REA, an express company subject to Part I of the Interstate Commerce Act, 49 U.S.C. 1(3)(a),[2] used the Richmond, Fredericksburg & Potomac Railroad as an underlying carrier for express shipments between Washington, D.C. and Richmond. Upon receiving notice that the Railroad would soon discontinue handling less-than-carload express shipments over this route, REA applied to the Commission for temporary authority to continue its express shipments by truck over highways generally paralleling the Railroad's tracks. See 49 C.F.R. 1131.2–1131.4. REA averred that the route was a necessary link in its nationwide express system and that no other carrier to its knowledge provided such service. The application was supported by eleven shippers, each declaring its current use of REA's express service in the area involved and its continuing need therefor. Each shipper stated that, in its opinion, no service other than REA's possessed all of the special characteristics required for the adequate handling of its express shipments, so that discontinuance of REA's service would create an im-

[1] REA is also temporarily authorized thereby to serve six specific intermediate and off-route points located between Washington, D.C. and Richmond (J.S. 26).

[2] See also 49 U.S.C. 303(a)(9), 303(a)(14), 902(d).

mediate and urgent need which no other carrier could meet.

Protests to the application were filed by the appellants, general motor freight carriers. They contended that it was unnecessary to grant temporary motor authority to REA because they could perform the same type of express service if REA were willing to tender express shipments to them between Washington, D.C. and Richmond. They suggested that they could interline shipments with other carriers to move commodities throughout the country, but did not show that they were able to provide coordinated, nationwide express service. Appellants also alleged that the Commission was obliged to deny REA's application because the shippers' statements in support thereof lacked the particularity required by the Commission's regulations. See 49 C.F.R. 1131.2(c).

The Commission's Temporary Authorities Board, an employee board, granted REA's application, finding that there was an immediate and urgent need for service and that no available carrier was capable of meeting the need (J.S. 24). Appellants' petitions for reconsideration were denied by Division 1 of the Commission, acting as an Appellate Division (J.S. 41).

Subsequently REA applied for permanent motor authority corresponding to its temporary authority, and the Commission has extended the temporary authority pending the outcome of the permanent application proceeding. See 49 C.F.R. 1101.1; *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R.R.*, 353 U.S. 436.

The three-judge court below unanimously affirmed the grant of temporary authority, holding that the

administrative record showed the appellants were not providing an express transportation service comparable in all respects to REA's (J.S. 21). The court also held that the Commission had properly considered the shippers' supporting statements, which adequately alerted the Commission to their continuing needs for REA's nationwide express service (J.S. 20–21).

ARGUMENT

Appellants' principal contention here (J.S. 5–8), as it was below, is that the Commission was required as a matter of law to reject REA's application because the statements of shippers supporting the application did not literally conform to the Commission's temporary authority regulations. Specifically, the regulations require that supporting shippers indicate whether efforts have been made to obtain the needed service from existing carriers, and the results of such efforts (49 C.F.R. 1131.2(c) (8)–(9), quoted at J.S. 7–8). Each of the shippers supporting the REA application stated that it was currently obtaining the needed service from REA and had no knowledge of any carrier other than REA that could offer adequate express service (J.S. 5, n. 3).

Appellants' argument, in the circumstances of this case, exalts form over substance and the court below properly rejected it (J.S. 20–21). The court noted that the Commission could consider the shippers' statements together with REA's statement and the statements of appellants themselves, which failed to allege facts to show that they were providing service comparable to REA's. Moreover, the courts and the Commission have repeatedly recognized the differences between

the express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States,* 221 F. Supp. 328, 332–333 (D. Mass.), affirmed *per curiam,* 376 U.S. 514; *REA Extension—Nashua, N.H.,* 91 M.C.C. 311, 324, 340–341; *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573, 579–583; *Mistletoe Express Service Extension—Texas,* 61 M.C.C. 737, 744–745; *REA Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114. Thus, the court below was correct in holding that, in the light of the record as a whole, Inquiries (8) and (9) of the regulations were "reasonably answered" (J.S. 21).[3]

Since only temporary authority is involved here, the Commission's decision is merely a preliminary determination designed to maintain the existing express service for the time being. Whether REA will be authorized under Section 207 of the Act, 49 U.S.C. 307, to operate permanently as a motor carrier in the area involved must await Commission resolution of REA's pending application.[4] Appellants are entitled to par-

[3] In *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453 (W.D. Wash.), existing carriers already provided a service identical to that proposed by applicants for temporary authorities, and there was no other evidence elsewhere in the record to justify a Commission grant. The court below found *Acme Cartage* to be "inapposite" (J.S. 21). Because of the factual distinctions this case and *Acme Cartage* do not represent a "conflict * * * between the 4th and 9th Circuits," as appellants suggest (J.S. 9–10).

[4] Contrary to appellants' assertions (J.S. 13), the Commission has published REA's permanent authority application in the *Federal Register* (33 Fed. Reg. 17502, 17513), and is actively processing that application.

ticipate in that permanent application proceeding and thereafter to seek judicial review of any adverse final action. As the court below concluded (J.S. 21–22), any other contentions concerning REA's operations as a motor carrier are premature at this time and must properly await a decision on its application for permanent authority.

CONCLUSION

The judgment of the court below should be affirmed.
Respectfully submitted.

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